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Case Number _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

BMMG, INC., ROBERT S. MANN, AND BOB MANN'S MALIBU GYM, INC.,

Petitioners,

v.

AMERICAN TELECAST CORPORATION, WALLY ARMSTRONG GOLF, INC., WALLY ARMSTRONG, KENNETH ROGERS AND GEORGE SUMMERALL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether under the Lanham Act, nonmovant plaintiff upon a motion for summary judgment must show that any one particular false statement in a wholly false advertisement, e.g. an advertisement which promotes that which does not exist, caused it a particular lost sale before it is entitled to an inference of a genuine issue of material fact in connection with its burden to show the fact of damage.

2. Whether relevant market in an action for damages under the Lanham Act may be determined as a matter of law.

LIST OF PARTIES

Petitioners BMMG, Inc., Robert S. Mann, and Bob Mann's Malibu Gym, Inc. were the plaintiffs and appellants below.

Respondents American Telecast Corporation, Wally Armstrong Golf, Inc., Wally Armstrong, Kenneth Rogers, and George Summerall were defendants and appellees below.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Petitioners BMMG, Inc., Robert S. Mann, and Bob Mann's Malibu Gym, Inc. respectfully pray that a writ of

certiorari issue to review the judgment of the Ninth Circuit Court of Appeal, filed December 1, 1994, of which rehearing and/or rehearing en banc was denied on February 7, 1995.

I. OPINIONS BELOW

The order denying rehearing and/or rehearing en banc is reprinted in the Appendix hereto as Exhibit A, at page 1.

The unreported memorandum opinion of the Ninth Court of Appeal is reprinted in the Appendix hereto as Exhibit B, beginning at page 2.

The unreported memorandum decision of the trial court (Hupp, J.) is reprinted as Exhibit C in the Appendix hereto, beginning at page 6.

II. JURISDICTION

The relevant claims by petitioners were predicated on the Lanham Act. 15 U.S.C. § 1125(a) and (a)(2). The trial court had jurisdiction pursuant to 15 U.S.C. § 1291.

On December 1, 1994, the trial court, The Honorable Harry L. Hupp presiding, entered judgment in favor of the Respondents. On June 9, 1993, petitioners filed a timely notice of appeal. On December 1, 1994, the Ninth Circuit Court of Appeal filed its memorandum opinion affirming the judgment of the trial court. Petitioners timely filed a petition for rehearing, which was denied by order dated February 7, 1995.

The jurisdiction of this Court to review the judgment of the Court of Appeal is invoked under 28 U.S.C. § 1254.

III. STATUTES INVOLVED

The statutes and regulations involved, Federal Rules of Civil Procedure, Rule 56 and the relevant section of Section 43(a) of the Lanham Act, 15 U.S.C. section 1125, are reprinted in the appendix beginning at page 27.

IV. STATEMENT OF THE CASE

A. Overview

As stated previously, the issue presented is whether under the Lanham Act, a plaintiff must show that at least one particular false statement in a completely false advertisement, e.g. an advertisement which promotes that which does not exist, caused a particular lost sale before it is entitled to an inference of a genuine issue of material fact in connection with its burden to show the fact of damage. In

addition, this writ presents the issue whether relevant market in an action for damages under the Lanham Act may be determined as a matter of law.

B. Statement of Facts

Petitioners were the first, and until 1991, the only producer and seller of golf instructional videotapes via television "infomercial."[1] In late 1990, petitioners began to use sports' celebrity endorsements in their infomercials. As a result they experienced increasing sales

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1. An "infomercial" is a commercial, television advertisement which contains a show portion, designed to be of special interest to a limited audience, e.g. golfers who wish to learn or improve their game, together with a commercial portion designed to sell the product, e.g. golf instructional videotapes. Infomercials are a relatively new, but extremely significant and growing, segment of the advertising industry. Their power is precisely from their "educational" format.

and profits. Petitioners' three instructional tapes run approximately two hours and could be purchased by infomercial viewers for approximately $45.00, including shipping and handling. Their tapes feature golf techniques which emphasize that a power swing's source is the golfer's legs.

The infomercial business is unlike traditional advertising in that each show is a separate profit and loss center. Each show is tracked to determine its rate of return. When the media cost of the infomercial exceeds the income derived from the sales of the product, it is no longer broadcast. For example, by December 1991, petitioners' were experiencing a ratio of revenue to media expenditures of approximately 2.9 (revenue) to 1 (media expenditure) in the

local broadcast market, 2.3 to 1 in the national cable market and 3.9 to 1 in the regional sports market.

In December 1991, respondents began to broadcast the infomercial entitled "Golfing Breakthroughs of the '90's" (the "Breakthrough Infomercial"). The Breakthrough Infomercial falsely advertised a set of instructional golf videotapes which were represented to be titled "Maximizing Your Game and Everything About It" (the "Maximizing Tapes"). The Maximizing Tapes could be ordered during the Breakthrough Infomercial for three payments of approximately $50. The Breakthrough Infomercial made the most fundamental false claim--<u>that the Maximizing Tapes existed</u>. Respondents did not tell Breakthrough Infomercial viewers that the

Maximizing Tapes had not yet been produced or that respondents had not yet commited to producing them.

In the Breakthrough Infomercial, Respondents made numerous additional, intentionally false and misleading representations. For example, the Breakthrough Infomercial claimed that the celebrity endorsers had seen and used the nonexistent tapes, that the nonexistent tapes taught a "revolutionary," "breakthrough" technique whereby the power swing's source is in the golfer's wrists and not the golfer's legs, and failed to disclose that noncelebrity endorsements were made by individuals with close personal and financial ties to respondent Wally Armstrong ("Armstrong").

From December 6, 1991 through February 8, 1992, respondent American

Telecast Corporation ("ATC") was using the Breakthrough Infomercial to "test market" the nonexistent Maximizing Tapes. As respondents' false advertisement was broadcast, petitioners' sales took a dramatic plunge. As a result of this precipitous drop, petitioners were financially unable to purchase television air time. Petitioners were literally "knocked off the air" by respondents' false advertising campaign.

For the three month period ended March 31, 1992, during "test marketing" and "roll out" or general broadcast, the respondents spent $1,888,000 to telecast the Breakthrough Infomercial. During that same period, respondents earned $4,546,000 in net revenues from the tape sales. For the three months ended June 30, 1992, the respondents spent $3,642,000 to broadcast

the Breakthrough Infomercial and earned in excess of $7,887,000 in net revenue from tape sales.[2] Respondents' $12,433,000 in sales for the period ended June 30, 1992 represented 77% of their revenue for that year.

Petitioners filed their Complaint on June 2, 1992. In late July 1992, respondent ATC edited the Breakthrough Infomercial. Among other things, respondent George (Pat) Summerall's ("Summerall") endorsement that the Maximizing Tapes "are more comprehensive, easier to apply than any golf video I've ever seen. . ." was deleted. Respondents

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2. The Maximizing Tapes were not filmed until two or three months after the Breakthrough Infomercial was first telecast. When subsequently produced, the Maximizing Tapes did not contain the "breakthrough" techniques that the Breakthrough Infomercial advertised.

also identified at least one noncelebrity endorser's relationship to Armstrong. As a consequence, petitioners were able to reenter the infomercial market in September 1992 and their revenues, media expenditures and profitability immediately returned to its prior, successful levels.

C. Proceedings Below.

Petitioner's complaint in the District Court asserted violations of the Lanham Act, Section 43(a), 15 U.S.C. 1125(a), pendent state law claims for violations of California's unfair competition and false advertising statutes (California Business & Professions Code §§ 17200 and 17500) and for common law business torts.

The respondents moved for summary judgment on all counts.

In opposition to the motions, petitioners presented evidence controverting nearly a dozen of respondents' allegedly undisputed facts, thus precluding summary judgment.

The trial court, however, granted respondents' motion finding, "[t]he question is to what extent did the false statements in the endorsements hurt sales of plaintiffs' product." In order to reach this conclusion the trial court ignored evidence in the record regarding relevant market, and determined petitioners' assertion defied common sense. The district court also ignored its own finding that respondents' advertisement was wholly false during the roll-out period. The state law claims essentially followed the reasoning and the fate of the Lanham Act claim.

On appeal, the Ninth Circuit found evidence that ATC's sales caused petitioner to lose sales. Nonetheless, the Ninth Circuit affirmed the district court in an unpublished opinion, and rehearing was denied.

Petitioners now seek certiorari.

V. REASONS FOR GRANTING THE WRIT

Petitioners' claims were substantively meritorious. The Central District and Ninth Circuit denied petitioners a fair hearing. The Ninth Circuit denied petitioners due process and equal protection in the following respects:

A. The trial court departed from the accepted and usual course of judicial proceedings on summary judgment by raising plaintiff's burden upon summary judgment to such an extent as to violate plaintiff's guarantee of due process and equal protection of the laws. The Ninth Circuit failed to correct this error.

Petitioners' burden upon summary judgment is to show merely that there is a genuine issue as to any material fact. Celotex Corp. v. Catrett, (1986) 477 U.S. 317, 324. Petitioners were not obligated to put forward all their evidence, as at trial, to create such a genuine issue. That lost customers were mislead by respondents' false advertisment "is not the sine qua non of a Lanham Act claim, but rather goes to the *quantum* of proof." Grant Airmass Corp. v. Gaymar, (S.D.N.Y. 1986) 645 F.Supp. 1507.

The presumption that consumers are in fact deceived under a "single source exception" justifies the presumption that a competitor was injured.

1. As it is a two firm market, material misrepresentations in respondents' advertising will damage petitioners.

Petitioners and respondents were the only two suppliers in the market for infomercial golf instructional videotapes. The First Circuit has found a presumption regarding damage will apply in a two source market. McCarthy, Trademarks and Unfair Competition (3d ed. 1995) at § 27.01[4] citing Electronics Corp. of America v. Honeywell, Inc., 428 F.2d 191.

The Ninth Circuit's December 10, 1994 memorandum opinion also misstated the record to say that appellants relied on a

legal presumption to prove the injury element of their case. That was not so.

2. Petitioners offered evidence that respondents' deception caused their harm.

Petitioners, however, did not rely solely on a presumption. Petitioners put forward evidence of the causal link between the Breakthrough Infomercial and their lost sales in both the testimony of petitioner Bob Mann and through petitioners' expert, Dr. Thomas Scott.[3]

Petitioner Mann declared, "Defendants' false and misleading Breakthrough Infomercial directly caused a substantial decrease in sales of my video

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3. There was additional supporting testimony and foundational data of petitioners' business entities' financial officer and the testimony of a certified public accountant.

tapes and related products." Dr. Scott testified, "I have examined the information in this case and based on my findings I feel that it is reasonable to conclude that American Telecast Corporation's false advertisements caused Bob Mann Sports to lose sales." The Ninth Circuit misstates the record when it concluded that petitioners solely relied on comparative sales data.

3. The Ninth Circuit created a conflict among the Circuits when it affirmed the trial court's determination of relevant market as a matter of law.

Petitioner Mann declared

> In 1992, the only two participants in the national market for the sale of golf instructional videotapes by television infomercial were myself and defendants. My infomercials and ATC's infomercials are in direct competitionwith each other. My business and my reputation were damaged by the false representations made in the Breakthrough infomercial.

It was not disputed that all of respondents' sales during the rollout period relied on the completely false Breakthrough Infomercial. There was evidence that at least some of those sales were at the expense of petitioners' sales. Were petitioners permitted to present all of their evidence, a reasonable jury may have inferred that the Breakthrough Infomercial in fact injured petitioners.

In order to avoid the conclusion that petitioners produced actual evidence of injury resulting from respondents' false and misleading advertisement, the Ninth Circuit accepted without comment the trial court's determination of relevant market.[4]

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4. The Central District opined that, "[p]laintiffs say that only plaintiffs and defendants use the infomercial method of advertising; this may be so, but that does not create a specialized sub-market. (continued...)

The Ninth Circuit thus affirmed the Central District's finding that petitioners were required to prove that specific false statements of the celebrity endorsers caused a loss of their sales. See, Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 210 (9th Cir. 1989).

Petitioners contend that the trial court incorrectly determined the relevant market. Determination of the relevant market is a factual determination properly left for the jury. When the Ninth Circuit affirmed the trial court on this point, it created a conflict among the Circuits. In Country Floors, Inc. v. Gepner, 930 F.2d

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4.(...continued)
advertising; this may be so, but that does not create a specialized sub-market. Obviously, plaintiffs and defendants must compete with all golf instructional products using differing media of advertising."

1056 (7th Cir. 1991), the Seventh Circuit found in a Lanham Act action that what is the relevant market should not be determined by the trial court on summary judgment "because it presents a genuine issue of material fact." As such, determination of relevant market should be left to the jury. Id. at 1066.

B. In an unpublished opinion, the Ninth Circuit departed from the accepted and usual course of judicial proceedings by failing to demonstrate it applied the appropriate de novo standard of review and by adopting a standard of causation in conflict with the purposes of the Lanham Act.

The Ninth Circuit failed to distinguish between the procedural posture of parties before it in Harper House and Jartran and petitioners. Both Harper

House and Jartran came before the Ninth Circuit after trial. The Ninth Circuit failed to permit petitioners the benefit of precedent. The Jartran presumption creates the inference on summary judgment that respondents' alleged deception caused petitioners' injury.

> The expenditure by a competitor or substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived.

U-Haul Intern., Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986). Likewise, the presumption should be applied on summary judgment to the fact of damage. As in tort law, this is a just result because of the

> practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did, let [the tortfeasors] be the one to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes and not merely that they acted in concert

Summers v. Tice, (1948) 33 Cal.2d 80, 85-86.

In fact, all respondents' sales in the rollout period were based upon a lie. Petitioners lost sales during that period. There was admissible evidence that those two events were causally connected. It was incorrect upon motion for summary judgment for the trial court to impose the additional burden upon petitioners to prove what properly should have been left for the determination by a jury upon weighing the evidence. Anderson v.

Liberty Lobby, Inc., (1986) 477 U.S. 242, 252.

> In sum, on a motion for summary judgment the responsibility of the district court is to determine if there are triable issues rather than to try those issues and make findings based on the affidavits and other materials accompanying the motion.

Country Floors, Inc. v. Gepner, supra, 930 F.2d at 1062.

Grants of summary judgment are properly viewed de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 110 S.Ct. 3217 (1990). The evidence must be viewed in the light most favorable to petitioners to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law. Tzung v. State Farm Fire & Cas. Co., 873 F.2d 1338, 1339-40 (9th

Cir. 1989). All inferences of fact must be resolved against the movant for summary judgment [respondents] and in favor of the party opposing the motion [appellants]. 6 Moore's Federal Practice, Part 1, ¶ 56.15[3] at 56-255, 6 Moore's Federal Practice, Part 2, ¶ 56.27[1] at 56-854.

The Ninth Circuit's December 1, 1994 memorandum opinion does not indicate that the Court applied the appropriate de novo standard of review. The Court's endorsement of the trial court's failure to resolve issues of fact in favor of BMMG on summary judgment--despite the presence of expert testimony on causation, supported by lost profits' evidence, and its erroneous application of Harper House and Jartran II suggests it adopted a standard of causation in conflict with the purposes of the Lanham Act.

C. These proceedings involve a question of exceptional importance as the Ninth Circuit's decision frustrates the purposes of the Lanham Act, to protect the public from false and misleading advertising. In practical application, it denied petitioner equal protection under the Lanham Act and the Federal Rules.

The infomercial industry is rapidly growing in importance as measured by dollar volume and consumer influence. The Lanham Act is a consumer protection law. It is analogous to the Sherman Act. Like the Sherman Act, the Lanham Act seeks to protect consumers by preserving free and fair competition in the market. To that end, these laws properly restrict sharp business practices. The goal of promoting competition is not advanced, however, if the courts are permitted to abandon their mandate to check outlawed activity.

Congress has determined that false advertising is a particularly detrimental and egregious practice. The Ninth Circuit's decision seeks to undo the Lanham Act in a particularly cowardly fashion--by unpublished opinion. Further, the Ninth Circuit sanctioned the trial court's disregard of this Court's instructions regarding the proper administration of "summary judgment."

Certainly the scales of conscience and fair dealing are corrupted when a large and powerful participant in the infomercial market is permitted to profit by an intentional fraud. As the Jartran trial court put it

> to embrace its position would be to reward a commercial privateer and to encourage further predatory advertising practices in the business world.

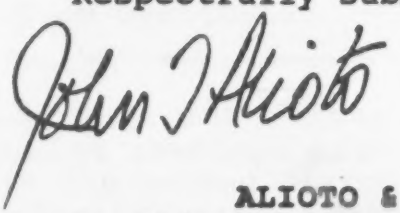
U-Haul Intern., Inc. v. Jartran, Inc., (D.Arizona 1986) 601 F.Supp. 1140, 1145.

VI. CONCLUSION

By their nature these are questions where uniformity of decision is of great importance and the same questions has repeatedly been before the lower courts. Petitioner has been denied procedural and substantive rights. A conflict has been created among the Circuits and federal law has been ignored.

For all of the above-stated reasons, petitioners respectfully requests that a writ of certiorari issue, and that the decision of the Ninth Circuit be subject to full consideration and appropriate disposition by this Court.

Respectfully Submitted,



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